UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	Criminal No. 00-104-P-C
	)	Civil No. 03-190-P-C
JOHN WAYNE MYERS,	)	
	)	
	)	

RECOMMENDED DECISION ON 28 U.S.C. § 2255 MOTION

John Myers has filed a motion for relief from his conviction of being a felon in possession of firearms and ammunition. (Docket No. 39.) The motion is broken into thirteen grounds, each with its own supporting memorandum (totaling 257 pages, excluding exhibits), all of which are premised on Myers's assertion that the authorities involved in his arrest conspired to frame Myers. After a thorough review of Myers's mammoth submission, I conclude that Myers has no viable ground for relief and that he is not entitled to an evidentiary hearing. I recommend that the Court **DENY** the motion.

Background

In ruling on Myers's motion to suppress this Court made extensive findings of fact.

> The evidence adduced at this hearing revealed that the search of Myers's car took place at the Androscoggin County Sheriff's Department on October 25, 2000, following the car chase and arrest of Myers on Route 4 in Turner, Maine by Deputy Rancourt and five other officers.
> Deputy Rancourt had acquired a significant amount of information about Myers prior to the chase that led to his stop and arrest. The day before, Rancourt had received a call from Timothy Doyle, a lieutenant with the Maine State Police, informing him that Doyle had received a call from a man named Gene Richardson, who had reported that Myers, who had just

visited Richardson's house, had recently been released from prison in Wisconsin and was on probation. Doyle also informed Rancourt that he had contacted the Wisconsin authorities and had learned that Myers had a restricted license and that a local warrant had been issued for Myers's arrest. [FN1] Subsequent phone conversations that Rancourt made on the 24th to Gene Richardson and Tom Renz, Myers's probation officer in Wisconsin, confirmed this information and also informed Rancourt that Myers was driving a Silver Reliant K car, with Wisconsin license plates issued under his name. During the phone conversation between Rancourt and Renz, Renz agreed to amend the warrant against Myers so that it would be entered into the national warrant system. Renz faxed a copy of the amended warrant request to Rancourt; this request indicated that Myers had been convicted of a felony. See Government's Exhibit 1.

> FN1. The restricted status of Myers's license required him to have a non probationary driver with him while he was operating a motor vehicle.

On the next evening, October 25, 2000, shortly after the beginning of Rancourt's shift, Rancourt received a call from Michael Richardson, the son of Gene Richardson. Michael Richardson reported to Rancourt that Myers was at Gene Richardson's house and that Myers had changed the plates on his car to New Hampshire plates. Rancourt subsequently assisted the Wisconsin authorities in the completion of the amendment to Myers's warrant, and verified that the national warrant system contained an active warrant for the arrest of Myers. Rancourt next took steps to assemble additional personnel for the arrest of Myers. At approximately 7:45 p.m., Rancourt and five other police officers met at the Greenland Diner, which is located on Route 4, approximately one mile south of Gene Richardson's residence. From the lot of the Greenland Diner, Rancourt called Michael Richardson on his cellular phone, informing Richardson that the officers planned to arrest Myers. Richardson informed them that Myers was standing in front of Gene Richardson's residence with Gene Richardson and his wife. [FN2] Deputy Rancourt and Trooper Keith Frank drove by the residence, confirmed this information, and subsequently returned to the lot of the Greenland Diner. Upon pulling into the lot, Rancourt received another call from Michael Richardson, who reported that Myers had just left Gene Richardson's residence and was driving south down Route 4 in his Reliant Silver K car. Rancourt informed the other officers that Myers was on his way towards the diner, and then he saw Myers's car. The officers exited the lot to pursue Myers. Rancourt drove behind the car of Sergeant Percy Turner, who was immediately behind Myers. During the pursuit of Myers, Rancourt was able to verify that Myers's car bore New Hampshire license plates, but he was unable to verify that the number on the plates matched the number that Richardson had reported to him. The officers used their blue lights and sirens to signal to Myers to pull over and, at one point, one of the officers drove next to Myers's car and

motioned for Myers to pull over. Myers, however, did not pull over until that officer drove ahead of him and slowed down his cruiser in order to force Myers to slow down and stop.

> FN2. Deputy Rancourt testified that, although Michael Richardson was not at his father's residence at this time, Richardson stated that he had learned this information from his father, who continued to call him from a cellular phone to keep him informed of the situation.

Myers subsequently pulled his vehicle over into a breakdown lane that was eight to ten feet wide, exited, and was placed under arrest. During the apprehension of Myers, Sergeant Turner stated that he had observed Myers throw an object that appeared to be a gun out of the window of his vehicle at some point during the chase. [FN3] At the time of Myers's arrest, it was approximately 8:00 p.m. and dark outside, and the road was not well lit. Rancourt observed that food, clothing, and household items were packed into each passenger seat of the car, up to the level of the windows. Rancourt had the car towed by a private towing company to the Androscoggin County Sheriff's Department. Rancourt and another officer, Deputy Clifford, conducted a warrantless search of the car at the Sheriff's Department at approximately 9:20 p.m. Each officer made a log of the items that they found during this search. *See* Government's Exhibits 3, 4. The officers discovered ammunition during the search. Although Myers informed the officers at the scene of his arrest that everything in the car belonged to him and asked the officers for his prescription medicine, Myers was not asked to remove valuables from the car.

> FN3. The officers subsequently found a firearm alongside the road, approximately fifty to seventy-five yards north of the location of the stop.

United States v. Myers, 2001 WL 210180, *1 -2 (D. Me. 2001).

The First Circuit Court of Appeals, in its decision on Myers's direct appeal, summarized a few other relevant circumstances of Myers's arrest and prosecution arising at trial:

> An inventory of [Myers's] automobile disclosed four boxes of bullets. A subsequent search of the area traversed during the chase--prompted by a report that [Myers] had thrown an object out of his car window while attempting to escape--yielded a .357 magnum handgun. Later, a citizen turned in a .22 caliber pistol found in the same general vicinity. Further investigation revealed that the ammunition and the

> weapons belonged to a resident of Houlton, Maine, who claimed that they had been pilfered. [Myers] denied any knowledge of the bullets, the guns, or the theft.
>
> On November 29, 2000, a federal grand jury returned a two-count indictment that charged [Myers] with being a felon in possession of ammunition and firearms. See 18 U.S.C. §§ 922(g)(1), 924(e) (2000). [Myers] was without funds, and, pursuant to the Criminal Justice Act, id. § 3006A, the district court appointed counsel for him in the person of attorney Peter Rodway. From the start, the two men squabbled over defense strategy. Nevertheless, [Myers] voiced no complaint to the district court and Rodway soldiered on, representing [Myers] vigorously both at a suppression hearing and at trial.
>
> Notwithstanding Rodway's valiant efforts, the jury found [Myers] guilty on both counts.

United States v. Myers, 294 F.3d 203, 204 -05 (1st Cir. 2002).

Scope of 28 U.S.C. § 2255 Relief

To obtain 28 U.S.C. § 2255 relief, Myers must demonstrate that his "sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255.

In Myers's direct appeal the First Circuit addressed and rejected Myers's principle claim before that Court: that his Sixth Amendment and Equal Protection rights were violated when the District Court did not allow his court-appointed attorney to withdraw, making way for the appointment of substitute counsel. Myers, 294 F.3d at 206-09. Although Myers repeatedly faults his attorney throughout his memoranda, he has prudently not attempted to resurrect this already litigated claim.

However, in his direct appeal Myers also filed a pro se brief[1] in which the First Circuit identified "three main points: (1) the deputy relied on an unsigned Wisconsin warrant to instigate the arrest; (2) the government suppressed exculpatory evidence and introduced false testimony in its case in chief; and (3) the government failed to forge a chain of custody sufficient to link the guns and ammunition to the appellant." Id. at 209. Myers "asseverational array," the Panel stated, seemed "better suited to a petition for post-conviction relief." Id.

While Myers seems to have interpreted this statement as an open invitation to expand his asserverational array in an ever broadening spectrum, the United States Supreme Court has "long and consistently affirmed that a collateral challenge may not do service for an appeal." United States v. Frady, 456 U.S. 152, 165 (1982) (collecting cases); accord Knight v. United States, 37 F.3d 769, 772 (1st Cir. 1994).

With respect to the three pro se claims as identified by the First Circuit, Myers cannot relitigate the claims as presented to that Court in this collateral attack. See Dirring v. United States, 370 F.2d 862, 864 (1st Cir. 1967). That said, in view of the First Circuit's invitation, I have carefully reviewed the entirety of Myers's single spaced, handwritten § 2255 submissions to unearth any claims that were not presentable on direct review and could only be properly treated in the § 2255 forum.

Myers's Multiple Grounds

Myers's 28 U.S.C. § 2255 petition contains thirteen delineated grounds. Myers has expressly identified the legal basis of each ground in his form petition and the thirteen supporting memoranda addressing the different claims. In his memoranda,

[1] On the first page of his 28 U.S.C. § 2255 petition Myers complains that his attorney on appeal "failed and refused to appeal Myers's conviction per se, filed 1 ground, pure garbage." (Docket No. 39 at 1.)

however, Myers also repeats allegations underlying his other grounds. This continuous rehashing of other claims does nothing to strengthen Myers's attacks and I deal with each claim identifying, as best as I can, the applicable facts and argument in the given memorandum.

One

Myers contends that the criminal complaint and indictment against him were flawed and constitutionally defective. With respect to the "facts" underlying this claim Myers asserts that the indictment and complaint did not track all three elements of the 18 U.S.C. § 922(g)(1)/§ 924(e) in that they omitted the lead phrase of § 922(g): "It shall be unlawful for any person..."[2] Accordingly, the grand jury's indictment was flawed and, in view of the underlying deficiency of the complaint and indictment, the Court had no jurisdiction to proceed. (Ground I Mem. at 1-5.) Furthermore, Myers states that the use of the word "knowingly" in the complaint and the indictment is an unnecessary "embellishment" in that it is not an element of the crimes with which he was charged. In Myers's opinion, these problems with the complaint and indictment are indicative of the perjury, false swearing, manipulation, deceit, altering and manufacturing of evidence,

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[2] Section 922(g)(1) of title 18 provides: "It shall be unlawful for any person [] who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year ... to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." Section 924 of that title states:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

18 U.S.C. § 924(e)(1). Myers nowhere argues that the facts propounded by the government were not sufficient to obtain a conviction on the two counts; he argues that the evidence was altered and fabricated in order to obtain the conviction.

withholding of evidence, fraud, and flawed constitutionality and "jurisdictionality" of the criminal case against Myers. (Id. at 6-7, 17-18.) These are the types of fatal, notice-depriving flaws, with the indictment that Myers asserts can be raised at any juncture as it calls into doubt the Court's jurisdiction over the defendant. (Id. at 18 -20.)[3] Nothing in Myers's asseveration calls into doubt this court's jurisdiction over the crime alleged in the indictment.

Myers could have raised this legal challenge to the indictment's specific wording at the early stages of his criminal prosecution and there is nothing in his § 2255 pleading that suggests that the merit of this ground only became apparent after Myers's direct appeal. See Fed. R. Crim. P. 12(b)(2); cf. Davis v. United States, 411 U.S. 233, 242 (1973) "(We believe that the necessary effect of the congressional adoption of Rule 12(b)(2) is to provide that a claim once waived pursuant to that Rule may not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of the showing of 'cause' which that Rule requires.") Nothing in Myers's petition, aside from the ineffective assistance claim addressed below, approaches alleging sufficient cause for Myers's failure to raise this challenge previously.

Even funneling this claim through the cause/prejudice prism of an ineffective assistance claim it has no vitality. With respect to alerting Myers to the illegality of his actions, the very fact that he was the subject of the complaint and indictment was sufficient to alert him to the illegality 'element' of the two counts. With respect to the "knowingly' element, his indictment was "embellished" to read that Myers "knowingly

[3] As an example of the type of crossing over to other grounds that Myers does in his memoranda, in his Ground I memorandum Myers expends considerable effort complaining of a multiplicity of other, non-Ground I, 'issues'. (Id. at 5, 7-16.) For another particularly strong example of Myers's penchant for cross-integrating grounds, see his Ground XII memorandum.

possessed in and affecting commerce ammunition" in violation of § 922(g)(1) and § 924(e) and "knowingly possessed in and affecting commerce firearms" in violation of § 922(g)(1) and § 924(e). The complaint also charged Myers with "knowingly possessed in and affecting commerce ammunition" in violation of § 922(g)(1) and § 924(a)(2). Even if this mention of level of intent were seen as surplusage, I could locate no case that stands for the proposition that apprising a defendant of too much of the government's charge works a constitutional violation.[4]

Two

In his second ground Myers claims that he was denied his right to a speedy trial and his attorney failed to apprise him of this fact. Myers faults his attorney for not pursuing motions in the period between the complaint and the indictment and for not filing motions before the initial deadline of December 15, 2000, but instead seeking an extension to December 29, 2000. (Ground II Mem. at 2-4) Myers undertakes a series of calculations concerning the running of the speedy trial time period before and during the pleading stages of the motion to suppress. (Id. at 2-4, 7-10.) He contends that by November 15, 2000, his attorney had ample information from Myers to challenge the seizure and search. (Id. at 6.) He also faults the United States for moving for an enlargement of time to respond to the motion to suppress and the Court for waiting eleven days after the suppression hearing to issue its order. (Id. at 7-9.)[5]

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[4] In passing, Myers also notes that the government failed to sustain any degree of proof as to Myers's knowing possession. (Id. at 12.) Myers cannot, on the one hand, complain that the intent element was an unnecessary redundancy and on the other hand argue that his conviction was constitutionally faulty because the prosecution failed to meet its burden of proof as to the redundancy (an element that Myers did not contest at any stage, of his now final, conviction process).

[5] The remainder of the memorandum on the speedy trial ground attacks the validity of a warrant for Myers's arrest and the probable cause for the search of his vehicle. (Id. at 10-17.)

A criminal complaint was filed against Myers on October 27, 2000. (Docket No. 1.) Myers was indicted on two counts on November 29, 2000. (Docket No. 7.) Myers requested, and was granted, an extension of time to file pretrial motions from December 15, 2000, to December 29, 2000, with the speedy trial time being tolled during the extension period. (Docket No. 8.) He filed a motion to suppress on December 28, 2000. Briefing was complete on February 20, 2001. The motion to suppress was denied on March 2, 2001. Trial commenced on March 12, 2001. There was no speedy trial violation.

The Three Claims Addressed On Direct Appeal

Four and Eleven

In his fourth lob, Myers opines that the stop, and thus, the two searches, arrest, and seizure of Myers's vehicle were illegal and unconstitutional. With respect to the facts underpinning this claim, Myers identifies the following. The stop was based solely on an arrest warrant that was not valid between 6:00 p.m. and 11:00 p.m. on that night. The prosecution knew of the invalidity of the warrant and that is why evidence of this warrant was presented in the suppression hearing but not at trial. The Wisconsin warrant was not enforceable outside of Wisconsin, and National Crime Information Center (NCIC) was never activated nor was an alert relayed to the Androscoggin County Sheriff's Department. The alleged discussion between Wisconsin authorities and the Androscoggin Sheriff Department personnel was hearsay and the Court and Myers's attorney should not have allowed it to come into evidence. Therefore, there was no valid reason to stop, seize, and search.[6]

[6] Myers also argues that the fact the officer who opened his door at the time of the stop asked Myers, "Who are you? What is your name?" is an indication that the authorities did not know the identity

Myers's eleventh § 2255 attack is likewise an assertion that his conviction was obtained only by dint of an illegal arrest, seizure, and search of Myers's vehicle:

- There was no valid warrant or NCIC hit (Ground XI Mem. at 1,3-4,6), the officers had no confirmation that Myers had attached illegal plates (id. at 2, 4, 6), they admitted that at the time of the stop the Maine authorities had no information that Myers had committed any crime in Maine (id. at 3,6), there is no documented evidence that Rancourt received a cell phone call from Michael Richardson at 6:50 p.m. apprising him of Myers's whereabouts (id. at 3-4); and Myers's Wisconsin drivers license was not restricted (id. at 5).
- Rancourt was on a fishing expedition and had no reason to believe that Myers had a gun or other contraband when stopped. (Id. at 4). Myers also argues that Rancourt was not told by Sergeant Turner that Myers had thrown a gun from his vehicle and, accordingly, this information could not form the basis for a search of his vehicle. (Id. at 5-6.)
- Rancourt got tired of waiting for a valid arrest warrant from Wisconsin and the authorities attempted to cover-up the illegality of the stop, seizure, and arrest by planting the two firearms on the side of the road. (Id. at 7-10.)
- Myers's attorney failed to call Michael Richardson and five other witnesses who could have exposed the conspiracy and cover-up. (Id. at 11.)

In its discussion of this claim of an illegal arrest on direct appeal the First Circuit reasoned:

> First, it is beyond cavil that the Wisconsin authorities informed their Maine counterparts that the appellant was in violation of his parole. On the basis of that information, the latter had sufficient reason to stop the appellant's vehicle. See United States v. Hensley, 469 U.S. 221, 231 [(1985)](holding that "police in one jurisdiction [may] act promptly in reliance on information from another jurisdiction" in such situations). The ensuing chase furnished unassailable grounds for the eventual arrest.

Meyers, 294 F.3d at 209. Myers's brief with respect to this ground neither raises a distinct constitutional theory nor is it based on facts only discovered after the direct appeal. This Court's ruling on the motion to suppress and the First Circuit's discussion above are the final words on this claim.

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of the person they were stopping. He also notes that the authorities did not dig out his old Maine driver's license until after Myers's arrest and, thus, did not know who they were arresting. This is just one example of the type of meritless attack on the government's description of events that is peppered throughout this petition (and with which Myers probably peppered his trial and appeals attorneys).

Five

In his fifth ground Myers complains that the prosecution did not disclose exculpatory evidence to Myers. The non-disclosed evidence listed by Myers is as follows:

- All relevant cell phone and land line records for Deputy David Rancourt, Mr., Mrs., and Michael Richardson,
- Myers's booking sheet for October 25, 2000.
- Missing sections of a October 25, 2000, police report
- Billing sheets for the towing of Myers's vehicle from the arrest location to Department's garage showing the place of pick-up, time, and distance hauled.
- Maine State Police video tape of Myers's stop (Myers having been informed, by some unidentified personage, that there was such a tape made).
- Police report/testimony of Houlton, Maine police officer, Ron Metcalf concerning the material he received from Gene Ross and indicating what he did with the items Ross turned over, as well as an alleged burglary report filed by Ross on or after October 30, 2000.
- The fourth page of the Sheriff Department's traffic log for October 26, 2000, relating to this case.
- Copy of a map drawn by the individual who allegedly found the .22 caliber gun by the roadside near the stop site depicting the location of the find.
- All 151 pages of suppressed material and page three of a December 8, 2000, letter from the prosecuting attorney to Myers's attorney indicating that the prosecution was not turning over Jencks material at that time.
- All chain of custody evidence relating to this case.
- Copy of Police Radio Code 10—1 through 10-99
- The time that Bertrand Barrett, III, was due to work at International Paper, in Jay, Maine between October 23 and October 27, and the mileage between the arrest site and International Paper.
- The time that Ross arrived home in Houlton, Maine on October 25, 2000.
- An October 26, 2000, Maine motor vehicle query for New Hampshire license plate 113-0376.
- An October 24, 2000, report from NCIC regarding the outstanding warrant from Wisconsin for Myers.
- An October 26, 2000, NCIC stolen gun report regarding a handgun with a serial number 301591.
- Police reports concerning Mr. Tiswell Erland, his wife, and two small children who all arrived at the Richardson residence at 9:25 p.m. on October 25, 2000.

The withholding and suppression of these materials, Myers contends, prejudiced his ability to defend himself against the charges.

With respect to Myers's claim concerning exculpatory evidence on direct appeal, the First Circuit explained:

> [T]he record before us does not support an inference of wrongdoing on the part of the government. While there were some inconsistencies in the testimony of various police officers (effectively exploited by Rodway in both cross-examination and closing argument), the record reveals nothing amounting to either a Brady violation, see Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that "suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is material either to guilt or to punishment"), or the knowing use of perjurious testimony, see Napue v. Ill., 360 U.S. 264, 269 (1959) (stating that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment").

Myers, 294 F.3d at 209. "If there is more light to be shed on these allegations," the First Circuit noted, Myers would be "free to develop them on a petition for post-conviction relief." Id.

I cannot identify how Myers's § 2255 petition has shed more light on these allegations. Myers seems to be speculating that if he could have obtained additional evidence – such as a tape of his stop, more phone records, and information about the Ross burglary – he could have transfigured what at trial was a competent cross-examination of government witnesses vis-à-vis certain discrepancies in their detail of events into a demonstration that the ground for his arrest and the charges against him were entirely concocted by the authorities involved. The exhibits that Myers has provided to buttress this claim (apparently obtained by him after his appeal) would not have provided such leverage. And, with respect to those materials that Myers claims are still missing --- such

as the tape (the existence of which is dubious), the fourth page of a police report, the Police Radio Code – Myers has not explained their materiality to his innocence to the charges against him.

Ten

Also a claim raised before the First Circuit, Myers's tenth ground is that the prosecution used evidence that did not comply with the chain-of-custody requirements.

With regards the .357 caliber firearm recovered the early morning following the arrest, Myers argues that it was left in some Sheriff Department evidence room on October 26, 2000, and turned over to United States Marshal Spellacy on the same date. (Id. at 4.) Spellacy gave the firearm to Agent Ferland on October 27, 2000, who turned it over to Kimberly Davidson, with whom it remained until October 29, but there is no documentation concerning what was done with it during that time period. (Id.) The next to be known about the firearm is that Saenz obtained it from Detective Charles Helms of the Maine State Police Crime Lab on February 22, 2001, but there is no record of how Helms came to have custody of it. (Id.) Saenz, on February 23, 2001, placed it in a vault/drawer. (Id.)

With respect to the second, .22 caliber, firearm attributed to Myers, it was turned into the Sheriff's Department at 12:10 p.m. on October 26, 2000, by a civilian, and Holt turned it over to Spellacy on the same day. (Id. at 5.) Spellacy turned it over to Ferland on October 27, and on that day he took it to Davidson at the State crime lab. (Id.) As with the other firearm, this gun was taken from the lab on February 22, 2001, by Saenz and then place in the same vault/drawer as the .357, location unidentified. (Id.)

Myers also complains that there is no evidence as to how any of the ammunition or either of the firearms got into the custody of the Assistant United States Attorney in time for presentation at Myers's March trial. (Id. at 6 - 7.)

Myers notes, further, that a gym bag, Myers's old Maine drivers license, and the New Hampshire license plates, were also allegedly seized from his vehicle by Rancourt and Clifford. (Id. at 7-8.) However, Myers contends, there is no chain of custody for these items. (Id. at 8.) And, with respect to the seized empty 500 round HCC, .22 caliber ammunition box, it was in Gene Ross's possession and purportedly turned over to the Houlton, Maine police department. (Id. at 9) However, Myers contends, there is no evidence or record that demonstrates that Ross actually turned this over to the police. (Id.) Myers states: "It may well be discovered that somebody on the Houlton P.D. sent gov. ex's 1A 1b 1c + 10 down to somebody in Lewiston or Portland and that's how they came to be evidence in this case." (Id. at 10.)

Myers's speculation aside, there is not anything in this § 2255 chain-of-custody ground that upsets the cart of apples brought before the First Circuit on direct appeal. The panel wrote:

> Finally, the proof establishing a chain of custody in this case was ample. Various witnesses described in detail how they came upon the boxed bullets and the firearms, respectively, and what they did with those items prior to trial. Given the circumstantial evidence here (i.e., that ammunition was found inside the car that the appellant had been driving, that the appellant had been observed throwing an object out of the car window, that both guns were found near the scene of the chase, and that the guns and ammunition had a common origin), no more was exigible. The links in a chain of custody need not be welded to one another, but, rather, may be more loosely connected. See United States v. Ladd, 885 F.2d 954, 957 (1st Cir.1989) (explaining that "the prosecution's chain-of-custody evidence must be adequate--not infallible"). To the extent that there were any weak links in the instant chain--notably, the time between the end of the chase and the time when the guns were found--their effect

> on the authenticity of the evidence was a matter within the exclusive province of the jury. See id.

Myers, 294 F.3d at 209 -10. Myers does not explain how concerns about the chain-of-custody regarding the gym bag, the old Maine driver's license, and the New Hampshire license plates would have altered the landscape of his trial in the slightest fashion.

Grounds Six, Seven, Eight, Nine, Twelve, and Thirteen

Myers's refrain of a frame-up goes on in a chorus of grounds not addressed during his direct appeal. These six grounds sound Myers's overriding theme that the prosecution altered and manufactured evidence and purloined perjury in order to obtain his conviction.

With respect to counts six and seven, Myers's conspiracy theory is based on allegations related to the ammunition found in Myers's vehicle. Furthermore, without attribution to a source, Myers contends that "it has been discovered" that Ross has no evidence of a burglary of his home in Houlton or of the loss of a .22 caliber firearm and/or .25 caliber ammunition from his home between April 2000 and November 2000.

He lists a series of what he determines to be evidentiary discrepancies as proof of the ever widening conspiracy. For instance, Myers notes two versions of a police report by Maine State Police Trooper Keith Frank. One version indicates that when the officers involved in Myers's arrest met at a location near the Richardson residence they met "prior to the residence" and the other copy indicates that they met, "Just prior to the residence." The latter appears to be the altered copy. Myers also points out that there are discrepancies vis-à-vis the time that Deputy Rancourt called other officers to have them rendezvous near the Richardson residence, with testimony and record evidence placing the call and the meeting time at differing points in the span between 7:00 p.m. to 9:05

p.m. Myers further identifies discrepancies in the times identified at the start of the vehicle inventory search. Myers claims that all of these evidentiary discrepancies were discovered by him only after his trial.

In his eighth and ninth grounds Myers identifies multiple instances of the subornation of oral and written perjury by the prosecution during Myers's trial:

- The government interviewed the Richardsons on two occasions and the agents were told that Myers left the Richardson home at 9:30 on the night in question and "was stopped and arrested by police ... when he left." Neither the government nor his attorney divulged to Myers any police report vis-à-vis these interviews or any interview of their son, Michael. Myers believes that these interviews generated highly exculpatory evidence to which he was entitled because it proved that the police involved in his arrest were lying through their teeth.
- The agents that interviewed Myers the morning after the arrest did not include in their report the fact that Myers told them that he left the Richardson resident at 9:34 p.m. and that he was arrested just as he left and in front of the Richardson Enterprise used car dealership. Yet these agents continually altered their police reports to create the illusion that Myers was guilty as charged.
- Myers also claims that grand jury testimony by governmental agents was false in that agents testified that, by leaving Wisconsin, Myers violated his parole, that there was a warrant out for Myers's arrest on October 25, and that there was a NCIC "hit" on Myers that afternoon.
- Myers identifies eighty-seven perjurious passages of testimony by Deputy Rancourt (concerning the mechanics – conversations, surveillances, meetings, locations, times -- of his attempt to arrest Myers, both prior to and during the arrest) (Ground VIII Mot. at 11-17); nine incidents of perjury by Deputy Clifford (vis-à-vis his participation in the arrest) (id. at 17-18); four bouts of perjury on the part of Trooper Frank (id. at 18); seven perjurious statements by Sergeant Turner (having to do with his testimony that he witnesses Myers dropping something from the car prior to the stop) (id. at 19); ten instances of false testimony by Gene Ross (regarding the burglary of his residence as well as his representations about the location of Houlton, Maine relative to Canada) (id. at 20-21); eight areas of perjury by Agent Saenz (respecting his post arrest investigation into the origins of the ammunition and what Myers told him during the investigation) (id. at 21-22); and falsehoods in the grand jury testimony of United States Marshal Spellacy (concerning Myers's relationship with the Richardsons and her summarization of the law enforcement dynamics of his arrest) (id. at 23-18).[7]
- All testimony concerning the Wisconsin warrant, Myers contends, was perjurious because there could not have been a valid warrant pertaining to the violation of

[7] Myers also details an extensive list of ways in which the Assistant United States Attorney perjured himself during the trial. (Id. at 25-35.) However, the statements of counsel over the course of trial do not constitute testimony and cannot, by definition, be perjury.

his parole based on his presence in Maine. (Ground IX Mot. at 1-5, 7-8,20-21.)[8] Myers has attempted to secure evidence that there was a valid Wisconsin arrest violation and/or a NCIC delayed 'hit sheet' to the Sheriff's Department but his efforts were rebuffed by the Court. (Id. at 5, 8.)

- Testimony of the agents involved in the recovery of the firearm alleged to have been recovered by the roadside near the area of the stop, the description of which did not entirely align with each other or fit with the reality of the site. (Id. at 14-19.)[9]

In his fifty-page memorandum on Ground Twelve Myers contends that his conviction was the bi-product of perjury, manipulation, evidence tampering and manufacturing, suppression of exculpatory evidence, conspiracy, fraud, obstruction of justice, illegal searches and seizures, a lack of jurisdiction, and an arbitrary and capricious Androscoggin County Sheriff's Department policy and procedure for conducting inventory and investigatory searches of vehicles.

And, Myers's thirteenth ground contends that the enhancement of Myers's sentence as an armed career criminal under 18 U.S.C. § 924(e)(1) and U.S.S.G. § 4B1.4, and (4)(c)(3) was illegal and unconstitutional because it was imposed in violation of the constitution and federal laws, the Court was without jurisdiction to impose such a sentence, it is in excess of the maximum authorized by law, and is otherwise subject to collateral attack, pursuant to his thirteen delineated grounds, as Myers contends that in view of the merit of his other twelve grounds he is "NOT GUILTY" of Counts I or 2. (Ground XIII Mem. at 1.) Along with recounting the thrust of the earlier grounds, Myers states that "an evidentiary hearing would do wonders for the truth-seeking function in this case, to expose the full scale and degree of conspiracy and collaboration that went on by

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[8] Much of Myers's Ground Nine memorandum repeats the allegations in his Ground Eight memorandum and need not be separately summarized.

[9] As quoted earlier, the First Circuit could identify no basis for concluding that the prosecution participated in "the knowing use of perjurious testimony." Myers, 294 F.3d at 209 (citing Napue v. Ill., 360 U.S. 264, 269 (1959)).

the government and its agents, as the architects, planners, and builders of this scam, reached through manipulating and altering their evidence in this case and by withholding and suppressing from Myers most all of the exculpatory materials." (Id. at 8.)

Myers's arrest through prosecution frame-up theory is not based on concrete evidence of conspiracy but, rather, on wholesale speculation that borders on the bizarre. See Barnes v. United States, 859 F.2d 607, 608 (8th Cir. 1988) ("Barnes now brings this collateral attack on his conviction, arguing that the lawyer he retained at trial was unprepared to present the case for the defense. Barnes's case depended on corroborating his bizarre explanation for the events [on the day of his arrest]. According to Barnes's testimony, he was the victim of a frame-up by the arresting police officer, who allegedly bore a personal grudge against Barnes over a woman named Leslie."). Myers is in essence asking to embark on a § 2255 fishing expedition, see cf. Perez v. United States, 274 F.Supp.2d 330, 336 (E.D.N.Y. 2003) ("Perez has provided not one iota of proof that any corruption took place during his case. Where, as here, the request for discovery is a mere fishing expedition, the Court will not grant it."), and I recommend that the court decline the invitation.

Three – The Ineffective Assistance of Counsel Claim

Finally, in his third ground Myers focuses his attention on the multifarious ways in which, he believes, he was denied effective assistance of counsel. The "facts" upon which Myers premises this claim are that his attorney, Peter Rodway, failed to take a variety of actions that would have brought to light the various "discrepancies" and claimed legal errors he has presented in the other grounds of this petition.

In his letter to the Court accompanying the § 2255 petition, Myers also faults his trial/sentencing attorney and his attorney on direct appeal for not uncovering the conspiracy by law enforcement personnel. He alleges that the government and its agents knew that the timeline of 6:50 pm to 9:20 pm was fake and that Myers was not arrested until he left the Richardson residence at about 9:30 pm. Myers claims that Rodway suppressed a two-page interview with the Richardsons prior to trial. He faults his attorney for doing nothing to preserve this time-line related claim that would have substantiated the conspiracy.

Claims of ineffective assistance of counsel are subject to the familiar two-prong standard set forth in Strickland v. Washington, 466 U.S. 668, 669 (1984). To prevail on this claim, Myers must show that his counsel's performance fell below a standard of objective reasonableness and that, but for that inadequate performance, the outcome of the proceedings would have been different. Id.

As the First Circuit observed, from the start of Rodway's representation of Myers, client and counsel "squabbled over defense strategy," yet "Rodway soldiered on, representing [Myers] vigorously both at a suppression hearing and at trial. Notwithstanding Rodway's valiant efforts, the jury found [Myers] guilty on both counts." Myers, 294 F.3d at 205. I need not advise the trial court as to the accuracy of this characterization of Myers's representation, particularly in light of the fact that this Court also presided over the motion to suppress and the post-trial motion concerning the breakdown of the attorney/client relation. United States v. McGill, 11 F.3d 223, 225 (1st Cir. 1993) ("[W]hen ...a petition for federal habeas relief is presented to the judge who presided at the petitioner's trial, the judge is at liberty to employ the knowledge gleaned

during previous proceedings and make findings based thereon without convening an additional hearing.").

Having concluded that there is no merit in any of the twelve grounds Myers would have had his attorney press at the time of trial, it is with some confidence that I deduce that Rodway's performance did not prejudice Myers within the meaning of Strickland. After wading through Myers's submissions, one gets a very distinct picture of the manner in which Myers would have had counsel approach the defense and that Myers was well served by counsel's refusal to pursue frivolous investigation, motions, and evidentiary lines of inquiry. In United States v. Hart, 933 F.2d 80 (1st Cir. 1991) the First Circuit has made it clear that counsel need not pursue all non-frivolous claims and can ignore the frivolous claims championed by his client. Hart opines: "For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy," id. at 83 nor is counsel "'required to waste the court's time with futile or frivolous motions,'" id. (quoting United States v. Wright, 573 F.2d 681, 684 (1st Cir. 1978)).

Lastly, with respect to Myers's repeated pleas that all will be divulged in an evidentiary hearing, evidentiary hearings are the exception rather than the norm, Moreno-Morales v. United States, 334 F.3d 140, 145 (1st Cir. 2003) ("Evidentiary hearings on § 2255 petitions are the exception, not the norm, and there is a heavy burden on the petitioner to demonstrate that an evidentiary hearing is warranted."), and certainly are not held by accepting an invitation to a fishing expedition. McGill, 11 F.3d at 225 ("When a petition is brought under section 2255, the petitioner bears the burden of establishing the

need for an evidentiary hearing. In determining whether the petitioner has carried the devoir of persuasion in this respect, the court must take many of petitioner's factual averments as true, but the court need not give weight to conclusory allegations, self-interested characterizations, discredited inventions, or opprobrious epithets," citations omitted); accord Barnes, 859 F.2d at 608-09.

Conclusion

For these reasons I am confident that there is no merit to any of the grounds raised in this 28 U.S.C. § 2255 motion and I recommend that the Court **DENY** the motion without an evidentiary hearing.

NOTICE

> A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.
>
> Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

November 25, 2003.

_____

Margaret J. Kravchuk
U.S. Magistrate Judge

U.S. District Court
District of Maine (Portland)
CRIMINAL DOCKET FOR CASE #: 2:00-cr-00104-GC-ALL
Internal Use Only

Case title: USA v. MYERS **Date Filed:** 11/29/00

Other court case number(s): None
Magistrate judge case number(s): 2:00-mj-00040

Assigned to: JUDGE GENE CARTER
Referred to:

Defendant(s)

JOHN WAYNE MYERS (1)
TERMINATED: 07/11/2001

represented by **JOHN WAYNE MYERS**
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TERMINATED: 07/11/2001
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: CJA Appointment

Pending Counts	**Disposition**
18:922G.F UNLAWFUL TRANSPORT OF FIREARMS, ETC.: Possession of Ammunition by a felon (1)	Two hundred thirty-five months (235) on each of counts 1 and 2 followed by a 5 year term of Supervised Release. $200 Special Assessment ($100 each count).
18:922G.F UNLAWFUL TRANSPORT OF FIREARMS, ETC. :Possession of a firearm by a felon 18 U.S.C. 922(g)(1) (2)	Two hundred thirty-five months (235) on each of counts 1 and 2 followed by a 5 year term of Supervised Release. $200 Special Assessment ($100 each count).

Highest Offense Level (Opening)

Felony

Terminated Counts	**Disposition**
None	

Highest Offense Level (Terminated)

None

Complaints	**Disposition**
possession of ammunition by a felon, 18:922(g)(1), 924(a)(2) [2:00-m -40]	

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